

PRE-EMPLOYMENT CREDIT CHECKS: EFFECTUATING DISPARATE IMPACT ON RACIAL MINORITIES UNDER THE GUISE OF JOB-RELATEDNESS AND BUSINESS NECESSITY

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I. INTRODUCTION

The current economic downturn, characterized by the most troubling recession in generations,¹ a crippling credit crisis,² a devastating housing market collapse,³ and ever-rising unemployment,⁴ has transformed the employment application process into a survival of the fittest. Employers are increasingly using credit checks—a permissible practice under the Fair Credit Reporting Act (FCRA)⁵—as a litmus test to weed out applicants allegedly more prone to stealing and performing poorly.⁶ But such a practice results in a Catch-22 for racial minorities, who have been shown, on average, to have lower credit scores.⁷ Job applicants need to secure employment to improve their credit, but employers reject them because they lack good credit.⁸

1. Peter Baker, *No Walk in the Park: For Obama One Year Later, It's the Slog of Governance*, N.Y. TIMES, Nov. 4, 2009, at A19, available at 2009 WLNR 22005251.

2. Jack Healy & Keith Bradsher, *Dollar Slides as Other Markets Climb*, N.Y. TIMES, Oct. 7, 2009, at B1, available at 2009 WLNR 19731963.

3. *This Year's Housing Crisis*, N.Y. TIMES, Jan. 5, 2010, at A20, available at 2010 WLNR 168580.

4. *Jobless Rates Rose in 42 States in November*, N.Y. TIMES, Jan. 23, 2010, available at 2010 WLNR 1466944.

5. 15 U.S.C. §§ 1681-1681x (2006). The FCRA provides that "any consumer reporting agency may furnish a consumer report" to a person who "intends to use the information for employment purposes." *Id.* § v04.

6. CONSUMER FED'N OF AM. & NAT'L CREDIT REPORTING ASS'N, CREDIT SCORE ACCURACY AND IMPLICATIONS FOR CONSUMERS 2 (2002), <http://www.ncrainc.org/documents/CFA%20NCRA%20Credit%20Score%20Report.pdf> ("Consumer access to credit, housing, insurance, basic utility services, and even employment is increasingly determined by centralized records of credit history and automated interpretations of those records."); SOC'Y FOR HUMAN RES. MGMT., WORKPLACE VIOLENCE SURVEY 19 (2004), http://www.slcc.edu/hr/docs/Workplace_Violence_Survey.pdf (explaining that background checks, including credit checks, are often used during the hiring process "to reduce the likelihood of potential violence from employees").

7. MATT FELLOWES, THE BROOKINGS INST., CREDIT SCORES, REPORTS, AND GETTING AHEAD IN AMERICA 9 (2006), http://www.brookings.edu/~media/Files/rc/reports/2006/05childrenfamilies_fellowes/20060501_creditscores.pdf; see also MO. DEP'T OF INS., INSURANCE-BASED CREDIT SCORES: IMPACT ON MINORITY AND LOW INCOME POPULATIONS IN MISSOURI 11 (2004), <http://insurance.mo.gov/reports/credscore.pdf> (providing an in-depth analysis on the disparate effect of using credit scores in the personal insurance context); TEX. DEP'T OF INS., REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS 13 (2004), <http://www.tdi.state.tx.us/reports/documents/creditrpt04.pdf> ("In general, Blacks have an average credit score that is roughly [ten percent] to [thirty-five percent] worse than the credit scores for Whites."); U.S. EQUAL EMP. OPPORTUNITY COMM'N, STATEMENT OF ADAM T. KLEIN, ESQ. (2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html> (comparing credit scores of African-Americans, Hispanics, and Whites).

8. Ben Arnoldy, *The Spread of the Credit Check as Civil Rights Issue*, CHRISTIAN SCI. MONITOR, Jan. 18, 2007, at 1, available at 2007 WLNR 1000447 ("It's definitely a civil

The following narrative is particularly instructive:

Robert Pagan, a Puerto Rican professional with three Fortune 500 companies under his belt, applied for a position as a Marketing Analyst with a large insurance company. As part of the interview process, he, along with several other candidates, was asked to create a presentation on how he would improve sell-through of the company's products in the Asian-American community (a market with which he was unfamiliar). After successfully presenting the marketing strategy, Robert was offered the position pending a background check. A week later, the company rescinded the offer citing "information contained within the background report." Upon receipt of a copy of the report, he observed that his record was clean with one exception (other than the late payment of a parking ticket by one week): a debt in collections. Robert called Human Resources to inform them the debt was being resolved. Their response—they were sorry, but they would no longer be able to offer him the position.⁹

rights issue because of the growing use of credit reports and credit scores for hiring, renting an apartment, insurance, and the fact that people of color have not been integrated into the credit scoring system as much as traditional, [W]hite, middle-class America," says Evan Hendricks, author of 'Credit Scores & Credit Reports: How the System Really Works, What You Can Do.'").

9. Interview with Robert Pagan, in New York City, N.Y. (Oct. 26, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Robert is only one of many racial minorities who have been affected by the increasing use of pre-employment credit checks. Provided below are the personal accounts of other racial minorities who similarly have been adversely affected by pre-employment credit check policies.

Alvin Mount, who is African[-]American, worked as a transportation security screener for the U.S. Department of Homeland Security at Los Angeles International Airport. During his probationary period, his employer performed a background credit check and found he had more than \$29,000 in delinquent accounts that were more than 180 days old. The published job description for the security screener position stated that a credit check revealing a default of more than \$5000 in debt (excluding certain circumstances related to a previous bankruptcy) would render an employee ineligible for the position. After the employer received the results of Mount's credit check, he was terminated because of his credit problems.

Lauren E. Barghols, *Credit Checks and Applicants: What You Need to Know*, 17 No. 9 OKLA. EMP. L. LETTER 4 (2009). Following his termination, Mount filed an employment discrimination complaint with the EEOC, and it was discovered that he was one of 166 airport employees who were terminated for having poor credit. *Id.*

Lisa Bailey worked for five months at Harvard University as a temp entering donations into a database. When the university made the job a salaried position, Ms. Bailey, who is [B]lack, saw a chance to lift herself out of dead-end jobs. Bailey's supervisors encouraged her to apply, she says, but turned her down after discovering her bad credit history.

Ben Arnoldy, *The Spread of the Credit Check As Civil Rights Issue*, CHRISTIAN SCI. MONITOR, Jan. 18, 2007, at 1, available at 2007 WLNR 1000447.

Although employers have offered seemingly rational arguments for the use of credit checks, research has shown that there is practically “no relationship between credit history and performance.”¹⁰ This research, combined with evidence that racial minorities are more likely to have low credit scores,¹¹ suggests that the employment of credit checks as a screening mechanism can have a disparate impact on racial minorities in violation of Title VII of the Civil Rights Act of 1964 (Title VII),¹² as amended, a position long asserted by the Equal Employment Opportunity Commission.¹³ Because credit reports are neither “job-related” nor “consistent with business necessity” as required by *Griggs v. Duke Power Co.*¹⁴ and its progeny, the use of them to sort out the “fit” job applicants from the “unfit” should be prohibited. Pending legislation on both the federal and state levels suggests this issue will soon come to rest, but absent statutory prohibition in the near future, employers should voluntarily discontinue this practice in favor of alternative indicators of employee performance.

A poor credit history was enough to ruin Brenda Matthews' job prospects at Johnson & Johnson Matthews got a job as a patent specialist at Johnson & Johnson's New Brunswick, N.J., headquarters and gave her current employer notice. Two weeks later Johnson & Johnson rescinded the offer because of her credit history

Andrea Coombes, *Bad Credit Can Kill Job Offer, Pre-Employment Screening Discriminatory, Lawsuit Claims*, CHARLESTON GAZETTE, June 19, 2004, at 6A, available at 2004 WLNR 1171735.

10. Jerry K. Palmer & Laura L. Koppes, Investigation of Credit History Validity at Predicting Performance and Turnover 4 (Apr. 3, 2004) (paper presented at the 2004 Society for Industrial and Organizational Psychology Annual Conference) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

11. MATT FELLOWES, THE BROOKINGS INST., CREDIT SCORES, REPORTS, AND GETTING AHEAD IN AMERICA 9 (2006), http://www.brookings.edu/~media/Files/rc/reports/2006/05childrenfamilies_fellowes/20060501_creditscores.pdf; MO. DEP'T OF INS., INSURANCE-BASED CREDIT SCORES: IMPACT ON MINORITY AND LOW INCOME POPULATIONS IN MISSOURI 11 (2004), <http://insurance.mo.gov/reports/credscore.pdf>; TEX. DEP'T OF INS., REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS 13 (2004), <http://www.tdi.state.tx.us/reports/documents/creditrpt04.pdf>; U.S. EQUAL EMP. OPPORTUNITY COMM'N, STATEMENT OF ADAM T. KLEIN, ESQ. (2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html>.

12. 42 U.S.C. §§ 2000e-2000e-17 (2006). If courts are persuaded to compare the use of credit reports in the hiring process to the use of criminal histories in the hiring process, the former will likely be deemed a violation of Title VII. Kelly Gallagher, Note, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 IOWA L. REV. 1593, 1612 (2006).

13. Testimony of Acting Chairman of the Equal Employment Opportunity Commission Stuart J. Ishimaru Before the Hawaii State Senate Committee on Labor 1 (Mar. 19, 2009), text available at http://www.capitol.hawaii.gov/session2009/Testimony/HB31_TESTIMONY_LBR_03-19-09_LATE.pdf (emphasizing the EEOC's stance “that credit check policies can have an unlawful disparate impact” on minorities looking for employment).

14. 401 U.S. 424, 429-31 (1971).

This Article proceeds in five parts. Part II explores the purpose of the FCRA and the requirements imposed upon employers interested in procuring credit reports for the purpose of evaluating a job applicant. Part III examines the statutory framework of Title VII and explores the disparate impact the use of pre-employment credit reports has on racial minorities, who, on average, have low credit scores. Part III also discusses case law grappling with the issue of whether credit check policies violate Title VII and suggests that such policies are neither “job-related” nor “consistent with business necessity.” Part IV examines pending federal and state legislation that would prohibit, with limited exceptions, the use of pre-employment credit checks and proposes the enactment of such legislation. Part IV also recommends that, absent a statutory prohibition, employers voluntarily cease reliance on a measure that has no relationship to employee performance. Part V concludes by noting that the state of the current economy depends on the rectification of this problem.

II. THE FAIR CREDIT REPORTING ACT: THE BACKDROP OF A DISCRIMINATORY EMPLOYMENT PRACTICE

In part to protect consumers from the abusive practices of lenders and consumer reporting agencies,¹⁵ Congress enacted the FCRA,¹⁶ which requires “that consumer reporting agencies adopt reasonable procedures . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of [consumer credit] information.”¹⁷ The FCRA defines “consumer report” (commonly referred to as “credit report”) to mean:

[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—

(A) credit or insurance to be used primarily for personal, family, or

15. The three national credit reporting agencies are Equifax, Experian, and Trans Union. Robert B. Avery et al., *An Overview of Consumer Data and Credit Reporting*, 89 FED. RES. BULL. 47, 47 n.1 (2003).

16. See Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. MEM. L. REV. 37, 38–41 (1994). Initially, consumers were concerned that credit reporting agencies were gathering and circulating inaccurate information. *Id.* at 37. Lending practices in the 1970s forbade the disclosure of any credit information to consumers, leaving consumers with no manner with which to challenge a lender’s decision. *Id.* at 38–39. Credit agencies further “disclaimed any guarantee of accuracy” in their credit reports, which lenders nonetheless accepted at face value. *Id.*

17. Fair Credit Reporting Act § 602(b), 15 U.S.C. § 1681(b) (2006).

- household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 1681b of this title.¹⁸

The following five types of information are generally available in a credit report, some of which scholars have argued is irrelevant to the background investigation of a job applicant:¹⁹

- (1) identifying information such as the name of the individual, current and previous residential addresses, and social security number;
- (2) detailed information reported by creditors (and some other entities, such as a medical establishment) on each current and past loan, lease, or non-credit-related bill, each of which is referred to here as a credit account;
- (3) information derived from money-related public records, such as records of bankruptcy, foreclosure, tax liens (local, state, or federal), garnishments, and other civil judgments, referred to here as public records;
- (4) information reported by collection agencies on actions associated with credit accounts and non-credit-related bills, referred to here as collection agency accounts; [and] (5) identities of individuals or companies that request information from an individual's credit record, the date of the inquiry, and an indication of whether the inquiry was by the consumer, for the review of an existing account, or to help the inquirer make a decision on a potential future account or relationship.²⁰

In the employment context, the FCRA permits a consumer-reporting agency to furnish a credit report “[t]o a person which it has reason to believe . . . intends to use the information for employment purposes.”²¹ Employers interested in procuring a credit report for “the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee”²² are required to provide advanced written notification to the job applicant and obtain written authorization from her.²³ If an employer decides to use the findings in the credit report, either in whole or in part, to take an adverse action, which includes “a denial of employment or any other decision for employment purposes that ad-

18. *Id.* § 603(d)(1).

19. See, e.g., Kelly Gallagher, Note, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for “Employment Purposes” Goes Too Far*, 91 IOWA L. REV. 1593, 1599–1600 (2006) (arguing that a good credit score does not necessarily mean that an individual will be a good employee).

20. Robert B. Avery et al., *An Overview of Consumer Data and Credit Reporting*, 89 FED. RES. BULL. 47, 48 (2003) (emphases omitted) (footnotes omitted).

21. Fair Credit Reporting Act § 604(a)(3)(B), 15 U.S.C. § 1681b(a)(3)(B) (2006).

22. *Id.* § 603(h).

23. *Id.* § 604(b)(2)(A).

versely affects any current or prospective employee,”²⁴ then the employer must provide the current or prospective employee with a copy of the report and a description of her rights before taking that adverse action.²⁵ Although a current or prospective employee must authorize the procurement of a credit report, employers are allowed to condition employment on that written authorization.²⁶ As a result, the current legal regime has permitted the securing of credit checks to develop into the widespread practice it has become.

III. EFFECTUATING DISPARATE IMPACT UNDER THE GUISE OF JOB-RELATEDNESS AND BUSINESS NECESSITY

Title VII of the Civil Rights Act of 1964, as amended, makes it an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race”²⁷ In *Griggs v. Duke Power Co.*, the United States Supreme Court held that Title VII “proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation[.]” namely “practices, procedures, or tests neutral on their face, and even neutral in terms of intent [that] ‘freeze’ the status quo of prior discriminatory employment practices.”²⁸ According to the Court, “Congress directed the thrust of the [Civil Rights] Act to the *consequences* of employment practices, not simply the motivation.”²⁹ Put simply, disparate impact claims “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”³⁰

24. *Id.* § 603(k)(1)(B)(ii).

25. *Id.* § 604(b)(3)(A).

26. *Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429, 434–36 (M.D. Pa. 2004), *aff’d*, 135 Fed. Appx. 499 (3d Cir. 2005).

27. Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2006).

28. 401 U.S. 424, 430, 431 (1971).

29. *Id.* at 432 (emphasis added).

30. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Last term, in *Ricci v. DeStefano*, the Supreme Court held:

[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the . . . discriminatory action.

129 S. Ct. 2658, 2677 (2009). According to some scholars, this holding seems to suggest that Title VII’s disparate impact framework is unconstitutional. *See, e.g., The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 282, 283 (2009). *Ricci* entrenches the Court’s colorblind approach to antidiscrimination law and, in so doing, strongly sug-

The discussion below explores the reasons pre-employment credit checks fall more harshly on racial minorities and then argues that credit checks are neither job-related nor consistent with business necessity as required to preserve the challenged practice.

A. *Disparate Impact of Pre-Employment Credit Checks on Racial Minorities*

Although Title VII was enacted over forty-five years ago to achieve equality of employment opportunities, racial minorities continue to be paid less than Whites³¹ and are more likely to hold low-paying jobs lacking advancement opportunities.³² Because of the continuing presence of employment barriers, African-Americans and Hispanics, as compared to

gests that Title VII's disparate impact provisions are unconstitutional because they mandate discriminatory compliance efforts unjustified by any compelling state interest. *Ricci* thus leaves the Court with a troubling dilemma it must eventually confront: either retreat from its current colorblind approach to equal protection, or rule disparate impact—a doctrine firmly ensconced in history, precedent, and congressional approval—unconstitutional. *Id.* Until the day on which “the war between disparate impact and equal protection [is] waged,” the disparate impact analysis will continue to serve as an anti-discrimination tool. *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring). In *United States v. Vulcan Soc’y, Inc.*, a case decided after *Ricci*, the federal government challenged under Title VII New York City’s reliance on two written examinations used to appoint entry-level firefighters. 637 F. Supp. 2d 77, 80 (E.D.N.Y. 2009). The court found that the tests resulted in a disparate impact upon African-American and Hispanic firefighters and that the city had failed to demonstrate the business necessity for such a test. *Id.* at 131–32. At the very outset, the court noted that *Ricci* did not control the outcome of the case at hand, which presented “the entirely separate question of whether . . . the [c]ity’s use of [e]xams . . . has *actually* had a disparate impact upon [B]lack and Hispanic applicants.” *Id.* at 83 (emphasis in original). The district court distinguished *Ricci* by noting that “New York City had taken significantly fewer steps than New Haven [took] in validating its examination.” *Id.*

31. BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS—THIRD QUARTER 2009, at 1, 5 tbl. 2 (Oct. 16, 2009), http://www.bls.gov/news.release/archives/wkyeng_10162009.pdf (stating that, during the third quarter of 2009, the median earnings for Whites working full time were \$753 per week, compared with \$607 for African-Americans and \$527 for Hispanics).

32. U.S. EQUAL EMP. OPPORTUNITY COMM’N, CHARACTERISTICS OF PRIVATE SECTOR EMPLOYMENT 4–5, 18–21 (2003), <http://archive.eeoc.gov/stats/reports/ceosummit/characteristics.pdf> (citing statistics that show a trend of minorities obtaining employment in low-paying jobs that provide little opportunity for individual growth). Though minority representation in the “Officers and Managers” field has grown substantially over the last ten years, African-Americans and Hispanics both “fall below their total representation as officials and managers, professionals, technicians, sales workers[,] and craft workers.” *Id.* at 15.

Whites, have lower household incomes,³³ are more likely to be living in poverty,³⁴ and are more likely to be living without health insurance.³⁵

To further exacerbate the plight of racial minorities, employers are increasingly relying on pre-employment credit checks as a screening mechanism. According to a 2004 study by the Society of Human Resource Management, “[m]ore employers are using credit checks in 2003 (35%) compared to in 1996 (19%).”³⁶ The extent to which credit checks are used may be a function of industry. In the retail industry, for example, 38.7% of retailers used credit history checks as a “pre-employment screening measure” in 2008, and estimates suggest that the retailers relied on credit history checks at an increase of 7.6% in 2009.³⁷

The increased use of pre-employment credit checks, combined with evidence that minorities are also more likely than Whites to have low credit scores, is a recipe for “a financial death spiral.”³⁸ The Brookings Institution, for example, recently examined the disparity of consumer credit

33. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, U.S. DEP'T OF COM., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 5–8 (2009), <http://www.census.gov/prod/2009pubs/p60-236.pdf>. In 2008, the income of non-Hispanic White, African-American, and Hispanic households was \$55,530, \$34,318, and \$37,913, respectively. *Id.* at 8. The median household income for African-Americans and Hispanics was sixty-two percent and sixty-eight percent, respectively, of the median income of White households. *Id.*

34. *Id.* at 15. In 2008, the poverty rate for Whites was 8.6%, 24.7% for African-Americans, and 23.2% for Hispanics. *Id.*

35. *Id.* at 23. In 2008, the uninsured rate for Whites was 10.8%, 19.1% for African-Americans, and 30.7% for Hispanics. *Id.*

36. SOC'Y FOR HUM. RES. MGMT., WORKPLACE VIOLENCE SURVEY 19 (2004), http://www.slcc.edu/hr/docs/Workplace_Violence_Survey.pdf. According to a more recent study performed by the Society for Human Resource Management, this percentage has increased to nearly forty-three percent. Thomas Frank, *Job Credit Checks Called Unfair Needy Hurt Most; 5 States Eye Limits*, USA TODAY, Feb. 13, 2009, at 1A, available at 2009 WLNR 2850256.

37. Richard C. Hollinger & Amanda Adams, 2008 NATIONAL RETAIL SECURITY SURVEY: FINAL REPORT 16, 19 (2008) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (referring to a 2008 survey of retail firms). Among the strategies that are receiving more attention and are estimated to be used more frequently by retail firms in the future are: criminal conviction checks, honesty testing, computer-assisted interviews, verification of past employment history, and credit history checks. *Id.* at 19. Interestingly, retail employers used pre-employment integrity screening techniques differently depending on the type of position being filled. *Id.* For example, when hiring for management positions, retailers used credit checks 33.3% of the time, whereas for non-management employees, employers used credit checks only 10.5% of the time. *Id.* at 20. For “professionals,” retail firms used credit checks as an integrity screening measure at a rate of 18.1%. *Id.*

38. Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, N.Y. TIMES, Aug. 7, 2009, at A1, available at 2009 WLNR 15275381 (explaining that the “worse their debts, the harder it is to get a job to pay them off”).

scores around the country and discovered that counties with relatively high proportions of racial and ethnic minorities are more likely to have lower average credit scores.³⁹ A Freddie Mac study similarly established a correlation between race and credit rating.⁴⁰ The results of these studies mirror the results reported by two states.⁴¹ According to the Texas Department of Insurance, “[i]n general, Blacks have an average credit score that is roughly 10% to 35% worse than the credit scores for Whites[, while] Hispanics have an average credit score that is roughly 5% to 25% worse than those for Whites.”⁴² Similarly, according to the Missouri Department of Insurance, “[c]redit scores are significantly correlated with minority concentration in a ZIP [c]ode, even after controlling for income, educational attainment, marital status, urban residence, the unemployment rate and other socioeconomic factors,” and “race/ethnicity proved to be *the most robust single predictor of credit scores . . .*.”⁴³

39. MATT FELLOWES, THE BROOKINGS INST., CREDIT SCORES, REPORTS, AND GETTING AHEAD IN AMERICA 9–10 (2006), http://www.brookings.edu/~media/Files/rc/reports/2006/05childrenfamilies_fellowes/20060501_creditscores.pdf (“Counties with credit scores ranging from 850-720 (very low risk) had a 5% African-American and Hispanic population while counties with credit scores from 500-559 (very high risk) had a 49% African-American and Hispanic population.”). According to the study, “this association reflects the numerous, historical disparities between races in the access to and availability of high quality education, well-paying jobs, and access to loans, among other factors.” *Id.* at 10.

40. U.S. EQUAL EMP. OPPORTUNITY COMM’N, STATEMENT OF ADAM T. KLEIN, ESQ. (2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html> (noting that the correlation between race and credit is stronger than the correlation between income and credit). According to the Freddie Mac study, twenty-seven percent of Whites have a “bad” credit record, while forty-eight percent of African-Americans and thirty-four percent of Hispanics have “bad” credit records. *Id.* According to Mr. Klein,

African-Americans have “bad” credit records at a 21% higher rate than Whites. This 21% [W]hite/[B]lack disparity in likelihood of bad credit is almost exactly the same magnitude as the 21% [W]hite/[B]lack disparity in likelihood of holding a high school diploma of *Griggs v. Duke Power Co.*, in which the Court disallowed a requirement of a high school diploma for certain manual labor jobs because 34% of [W]hite males but only 12% of African-American males had high school diplomas in the state.

Id. (emphases omitted) (footnotes omitted).

41. See FED. TRADE COMM’N, CREDIT-BASED INSURANCE SCORES: IMPACTS ON CONSUMERS OF AUTOMOBILE INSURANCE 3–4 (2007), http://www.ftc.gov/os/2007/07/P044804FACTA_Report_Credit-Based_Insurance_Scores.pdf (finding that “African-Americans and Hispanics are substantially overrepresented among consumers with the lowest [credit-based insurance] scores (the scores associated with the highest predicted risk) and substantially underrepresented among those with the highest scores”).

42. TEX. DEP’T OF INS., REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS 13 (2004), <http://www.tdi.state.tx.us/reports/documents/creditrpt04.pdf>.

43. MO. DEP’T OF INS., INSURANCE-BASED CREDIT SCORES: IMPACT ON MINORITY AND LOW INCOME POPULATIONS IN MISSOURI 11 (2004), <http://insurance.mo.gov/reports/credscore.pdf> (emphasis added).

Moreover, insured African-Americans and Hispanics received credit scores in the lowest score group “at a rate of about 30 percentage points higher than did other individuals.”⁴⁴

Recognizing the potential discriminatory consequences of pre-employment credit checks, “the EEOC has had a longstanding position that credit check policies can have [a] disparate impact” on racial minorities in violation of Title VII.⁴⁵ Beginning in the 1970s, the EEOC issued a number of decisions finding that employers violated Title VII by basing employment-hiring decisions on a worker’s credit history. In EEOC Decision No. 72-427, for example, an African-American was not hired as a computer operator by a bank, at least partially because of his marginally poor credit record.⁴⁶ Although the Commission observed that the record was silent concerning the proportion of relatively poor credit records among African-American and White individuals residing within the area from which the bank drew its workforce, it noted that “according to the 1967 Census Bureau figures 35.4 percent of the total number of . . . non-[W]hite persons in the United States were below the poverty level, as compared with 10.3 percent of the total number . . . of [W]hite persons.”⁴⁷ Inferring that the bank’s credit record policy would have a foreseeably disproportionate impact upon African-Americans as a class, the Commission held that such a practice discriminated on the basis of race within the meaning of Title VII and, thus, was unlawful absent a showing by the bank that such a policy was required by business necessity.⁴⁸ Similarly, in EEOC Decision No. 72-1176, a bank denied employment to a Hispanic applicant for a teller position after discovering adverse credit information in a credit check conducted by the bank for the purpose of reappraising

44. *Id.*

45. Testimony of Acting Chairman of the Equal Employment Opportunity Commission Stuart J. Ishimaru Before the Hawaii State Senate Committee on Labor 1 (Mar. 19, 2009), text available at http://www.capitol.hawaii.gov/session2009/Testimony/HB31_TESTIMONY_LBR_03-19-09_LATE.pdf. It should also be noted that the Bankruptcy Act prohibits employers from discriminating against present or former debtors. 11 U.S.C. § 525(a)-(b) (2006).

46. EEOC Dec. No. 72-427, 1971 WL 3943, at *1 (holding that the bank’s employment practices in using an aptitude test that disparately impacts African-Americans discriminated against African-Americans, as did its policy of basing fitness for employment on arrest and credit records).

47. *Id.* A policy that is unintentionally discriminatory in that it has a disparate impact on ethnic minorities when implemented even when neutral on its face is unlawful. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (D.C. Cal. 1970). The only exception to prohibiting policies with a disparate racial impact requires a showing that the policy is essential for (1) safety and (2) an efficient operation of business. EEOC Dec. No. 72-427, 1971 WL 3943, at *1 (citing *Gregory*, 316 F. Supp. at 403).

48. EEOC Dec. No. 72-427, 1971 WL 3943, at *1.

her as a potential employee.⁴⁹ In finding the bank's policy of screening applicants on the basis of credit references to have a disproportionate impact on minorities and, thus, violative of Title VII, the Commission once again compared the poverty level of non-Whites to that of Whites and explained that such a policy required a business justification.⁵⁰ Lastly, inferring from the relevant Census Bureau statistics that "minorities are significantly over-represented among low-income groups and that they are more likely to suffer financial difficulties than Caucasians[.]" the Commission in EEOC Decision No. 74-2 held that an employer's inquiry into a job applicant's financial status, including disclosure of past-due loans, would have a "foreseeable disproportionate adverse impact upon the employment opportunities of minorities as a class" and, thus, was violative of Title VII absent a showing of business justification.⁵¹

More recently, in race and color discrimination guidance last modified in 2006, the Commission reemphasized that credit checks—and "other employment policies that relate to off-the-job employee conduct"—may be challenged under a disparate impact theory.⁵² The federal court docket has yet to include a case in which a plaintiff has alleged that pre-employment credit checks have had a disparate impact on racial minorities,⁵³ mainly because of the fact that discriminatory termination cases are six times more likely to succeed than discriminatory failure to hire cases⁵⁴ and the fact that job applicants are screened out of the hiring process for reasons unknown to them.⁵⁵ But federal courts have found that

49. *Id.* at *2 (holding that the bank's rationale for not hiring the Hispanic applicant was "without merit"). At the time, Hispanics comprised roughly twenty-five percent of the population, yet only six percent were represented among the bank's staff. *Id.*

50. *Id.* at *1.

51. EEOC Dec. No. 74-2, 1973 WL 3926, at *2.

52. EEOC COMPLIANCE MANUAL § 15-VI(B)(2) (2009), available at <http://www.eeoc.gov/policy/docs/race-color.pdf>.

53. The federal docket, however, has included discrimination claims challenging an employer's credit check requirement under a disparate treatment theory. See, e.g., *Terry v. Elec. Data Sys. Corp.*, 940 F. Supp. 378, 380 (D. Mass. 1996) (alleging racial discrimination in employment based on plaintiff's credit delinquency), *aff'd*, 107 F.3d 1 (1st Cir. 1997). The African-American plaintiff was recommended for a permanent position with the company contingent upon the satisfactory completion of a background check, but the background investigation revealed that the plaintiff had defaulted on a student loan, and he was denied the position. *Id.*

54. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1027 (1991).

55. U.S. EQUAL EMP. OPPORTUNITY COMM'N, STATEMENT OF ADAM T. KLEIN, ESO., (2007). <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html> ("[A]n applicant rejected for having an insufficiently positive credit record typically will not know that a never-disclosed employer credit-history check is the reason."). But the Fair Credit Reporting Act requires that employers interested in procuring a credit report for employment purposes receive written authorization from the job applicant and, if an adverse action is

the use of general background investigations of applicants for employment purposes, which include, *inter alia*, inquiries into the applicant's financial history, violates Title VII.⁵⁶

B. Pre-Employment Credit Checks Are Neither Job-Related nor Consistent with Business Necessity

After the plaintiff has demonstrated that the employer "uses a particular employment practice that causes a disparate impact on the basis of race," the employer bears the burden of "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity."⁵⁷ This standard, now codified into Title VII, originated from *Griggs*, in which the Court rejected two job requirements because neither was "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted . . . without meaningful study of their relationship to job-performance

taken based on the findings in the credit report, provide the applicant with a copy of the report. § 604(b)(2)(A), (b)(3)(A).

56. *See, e.g.,* United States v. City of Chicago, 549 F.2d 415, 432 (7th Cir. 1977) (finding that a city police department's use of background investigations, which included credit checks, for applicants for patrolman positions had a disparate impact on minority applicants and was not related to job performance). The court conceded that a background investigation "can be a useful device in determining whether an applicant has the personal qualities required of a police officer[.]" but the particular investigation conducted by the Chicago Police Department did not meet the court's standard. *Id.* The department was unable to conclusively define the criteria or even specify what negative information would require disqualification of any applicant displaying undesirable characteristics. *Id.* More troubling were the areas from which the department could find these undesirable qualities: the investigation took into account the "applicant's social status, financial condition, arrest and driving records, military, employment and educational background, and the arrest record of his family." *Id.* The lack of clarity within the department's background investigation processes "[made] it impossible to determine whether the background investigation actually served to select applicants according to real differences in job-related qualifications." *Id.*; *Dozier v. Chupka*, 395 F. Supp. 836, 851-52 (S.D. Ohio 1975) (concluding that defendant fire department's background checking process was not shown to be job-related in nature and was, therefore, unlawful). The department argued that "external pressures," such as the use of drugs and alcohol, gambling, and even "*poor financial risks*," negatively affect how an individual performs on the job. *Dozier*, 395 F. Supp. at 851 (emphasis added). However, the department was unable to offer any proof that its selection criteria was actually job-related in nature. *Id.* at 851-52. *But see* Robinson v. City of Dallas, 514 F.2d 1271, 1274 (5th Cir. 1975) (finding that debt termination practices were not discriminatory). A former African-American city employee failed to establish a prima facie case that the city personnel rule authorizing the employer to punish employees who did not pay their "just debts" discriminated against African-Americans in violation of Title VII. *Id.* The court reasoned "that although Negroes comprise a disproportionately large percentage of the poor, they do not comprise a disproportionately large percentage of the poor who do not pay their just debts." *Id.* at 1273.

57. Civil Rights Act of 1964 § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

ability.”⁵⁸ As the Court noted, because there are certain employment procedures “that operate as ‘built-in headwinds’ for minority groups . . . [t]he touchstone is business necessity.”⁵⁹ Four years later, the Court fleshed out this requirement in *Albemarle Paper Co. v. Moody*.⁶⁰ In that opinion, the Court stated that “[j]ob relatedness cannot be proved through vague and unsubstantiated hearsay”; instead, it must be shown “by professionally acceptable methods, to be ‘predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.’”⁶¹ Provided the validation study is reliable, an employer may utilize the test “in jobs other than those for which it has been professionally validated only if there are ‘no significant differences’ between the studied and unstudied jobs.”⁶²

In *EEOC v. United Virginia Bank*, the EEOC alleged that race, *inter alia*, played a role in United Virginia Bank’s (UVB) determination of which job applicants were subject to pre-employment credit checks and that the use of pre-employment credit checks was discriminatory because it had a disproportionate impact on African-Americans.⁶³ First, the court noted that the EEOC had not established that UVB had treated African-Americans with adverse credit reports differently than Whites with similarly adverse credit reports.⁶⁴ Second, the court, assuming that pre-employment credit checks could disproportionately impact African-Americans, found that “the securing of credit reports would be permissible . . . so long as it was secured on applicants regardless of race,” because

58. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Interpreting the “job related for the position in question and consistent with business necessity” standard adopted by Title VII, the Third Circuit in *Lanning v. Southeastern Pennsylvania Transportation Authority* held that “in order to show the business necessity of a discriminatory cutoff score an employer must demonstrate that its cutoff measures the minimum qualifications necessary for successful performance of the job in question.” 181 F.3d 478, 489 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000).

59. *Griggs*, 401 U.S. at 431, 432.

60. 422 U.S. 405, 428–35 (1975).

61. *Id.* at 428 n.23, 431 (quoting 29 C.F.R. § 1607.4(c)).

62. *Id.* at 432 (citing 29 C.F.R. § 1607.4(c)(2)).

63. 21 Fair Empl. Prac. Cas. (BNA) 1392, 1393–94 (E.D. Va. Oct. 7, 1977) (alleging discriminatory employment practices); *cf.* *Bailey v. DeBard*, No. IP 74-458-C, 1975 WL 227, at *15–18 (S.D. Ind. July 31, 1975) (holding that a police department’s use of a background investigation for trooper positions, including an inquiry into the applicant’s credit, was not a violation of Title VII); *Marshall v. District of Columbia*, No. 74-990, 1975 WL 219, at *1, *3 (D.D.C. Aug. 6, 1975) (granting summary judgment to a police department, having found no evidence supporting an African-American policeman’s claim that the department’s regulation with respect to bankruptcy of applicants and employees had been discriminatorily applied on the basis of race).

64. *UVB*, 21 Fair Empl. Prac. Cas. (BNA) at 1402.

“the banking business is a fiduciary business . . . where there is a good deal of cash openly handled.”⁶⁵ The court ultimately characterized “the question of credit reports [as] moot [with] respect to the injunctive remedy sought [because UVB] no longer secure[d] preemployment credit reports.”⁶⁶

Similarly, in *EEOC v. American National Bank*, the EEOC alleged that American National Bank engaged in a pattern or practice of racial discrimination that included the use of credit checks.⁶⁷ At the outset, the court noted that the EEOC failed to produce evidence showing that the use of credit checks affected African-Americans more harshly than Whites.⁶⁸ The court further noted that the use of credit checks by American National Bank “served legitimate, important, and job-related business purposes”:

Many of [American National Bank]’s employees, particularly tellers, were exposed daily to a great deal of money. Although any employee in such circumstances might entertain occasional thoughts of stealing money, *experience* had taught [the bank] that individuals with credit problems found the temptation particularly difficult to resist. Moreover, customers would rapidly lose confidence in [the bank] if they knew that persons who lacked the ability to manage their own financial affairs were handling the money of others.⁶⁹

As a result, the bank’s use of credit checks was held not to violate Title VII.⁷⁰

1. Credit History Is Not Indicative of Successful Job Performance

Under *Griggs* and its progeny, an employer interested in defending a practice of pre-employment credit checks must prove that it engaged in a

65. *Id.* at 1402–03.

66. *Id.* at 1403.

67. No. 76-26-N, 1979 WL 25, at *33 (E.D. Va. June 25, 1979) (discussing the discriminatory misuse of credit checks for potential employees). *aff’d in part, and rev’d in part on other grounds*, 652 F.2d 1176 (4th Cir. 1981). Before and during trial, the EEOC argued that the screening, interview, and hiring practices utilized by American National Bank violated Title VII. *Id.* Although the court noted that the instant case was a disparate treatment case, rather than a disparate impact case (due to the EEOC’s own concessions), its characterization of credit checks as consistent with business necessity is instructive. *See id.* at n.62.

68. *Id.*

69. *Id.* (emphasis added).

70. *Id.* The court reiterated that the bank is “entitled to formulate its own hiring policies and practices.” *Id.* at *49. The nature of the banking industry and the responsibilities assigned to employees of a bank provide enough justification for banks utilizing credit checks to screen potential employees. *See id.*

"meaningful study of their relationship to job-performance ability" and "successful performance."⁷¹ A number of rational arguments have been made for the use of credit checks in employment screening including: (1) credit history reflects past applicant conscientiousness;⁷² (2) credit history might indicate whether an applicant is currently in financial trouble, which could be indicative of the likelihood or temptation to steal or to leave the company for another, better paying job;⁷³ and (3) credit checks

71. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

72. Jerry K. Palmer & Laura L. Koppes, *Investigation of Credit History Validity at Predicting Performance and Turnover I* (Apr. 3, 2004) (paper presented at the 2004 Society for Industrial and Organizational Psychology Annual Conference) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (announcing employers' reasoning behind the use of credit reports prior to extending an employment offer). According to Drs. Palmer and Koppes,

The first argument [made by employers] is that a credit report reflects past conscientiousness and responsibility, such as meeting deadlines and obligations, and non-procrastination. If an applicant had, in the past, frequently been late in making payments or had not paid their debts at all, the credit report would serve as an objective record of this. Unlike personality tests of conscientiousness or integrity, intentional distortion by the applicant would be unlikely in the case of the credit report. Furthermore, the best predictor of future behavior is past behavior, and a credit report, unlike a personality test, could be taken to be a more objective measure of past behavior, rather than a measurement of past behavior as recalled and reported by the applicant himself/herself.

Id.; see also Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, N.Y. TIMES, Aug. 7, 2009, at A1, available at 2009 WLNR 15275381 ("Business executives say that they have an obligation to be diligent and to protect themselves from employees who may be unreliable, unwise or too susceptible to temptation to steal, and that credit checks are a help."); Tiffany Hsu, *Credit Checks May Be Curbed*, L.A. TIMES, Sept. 9, 2009, at 1, available at 2009 WLNR 17644441 ("Companies defend the practice [of using credit checks] as a way to help verify that candidates are responsible and trustworthy.").

73. Jerry K. Palmer & Laura L. Koppes, *Investigation of Credit History Validity at Predicting Performance and Turnover I* (Apr. 3, 2004) (paper presented at the 2004 Society for Industrial and Organizational Psychology Annual Conference) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). The authors explain:

[I]t could be argued that an applicant in financial trouble might be more tempted, and therefore more likely, to steal from the company. . . . Furthermore, it might be the case that an employee in financial trouble may be more likely to quit their job when another, better paying job opportunity arises.

Id. Employee theft is certainly a growing problem. According to the Federal Bureau of Investigation, employee theft is the fastest growing crime in the country "and is expected to increase by 15% annually." Assembly Bill Analysis of A.B. 943, as amended July 9, 2009, at 3, available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0901-0950/ab_943_cfa_20090908_204635_asm_floor.html. Employee theft has been estimated to cost "business owners and operators an estimated [one hundred billion dollars] worldwide each year." William I. Sauser, Jr., *Employee Theft: Who, How, Why, and What Can Be Done*, S.A.M. ADVANCED MGMT. J., Summer 2007, at 13.

help to avoid a negligent hiring claim.⁷⁴ Despite these assertions, “credit history as a predictor of employee performance has received little or no research attention.”⁷⁵ Recognizing the need for examination of the validity of credit history as a predictor of employee behavior, Dr. Jerry K. Palmer and Dr. Laura L. Koppes of Eastern Kentucky University created a study in which they tested the following hypothesis: “Credit report data will predict employee performance ratings and termination. More specifically, . . . applicants with good credit reports will, after being hired, receive more positive performance evaluations and will be less likely to be terminated from their jobs.”⁷⁶ The results of the study showed, however,

74. Jerry K. Palmer & Laura L. Koppes, Investigation of Credit History Validity at Predicting Performance and Turnover 1 (Apr. 3, 2004) (paper presented at the 2004 Society for Industrial and Organizational Psychology Annual Conference) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). According to the authors,

A third argument for use of credit history in employee selection might be to avoid a negligent hiring lawsuit. Implicit in this argument is the rationale of the second reason presented above; if a person in financial trouble constitutes a higher likelihood to steal, this likelihood may present a threat to the company's clients and employees in addition to the company itself.

Id. at 2 (citation omitted).

75. *Id.* at 4. As noted by Mr. Klein,

Some employers argue that a heightened “credit history” standard is appropriate for positions that have ready access to cash or financial products. Bank tellers, for example, have the means and opportunity to steal money from the bank—their own history of financial accountability therefore must satisfy the Title VII job related *and* consistent with business necessity defense. But where is the proof of a correlation between a heightened propensity to steal and credit history? And if credit history is an accurate predictor of criminality, wouldn't we expect employers to monitor current employees as a prophylactic measure to guard against employee theft? The answer is that there is simply no support for the proposition that applicant (or incumbent employee) credit score or history correlates to a heightened risk for theft. And given that African[—]American applicants are more likely to have bad credit, the notion of risk of theft also fosters a shameful historic racial stereotype.

U.S. EQUAL EMP. OPPORTUNITY COMM'N, STATEMENT OF ADAM T. KLEIN, ESQ. (2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html> (emphasis in original); *cf.* Lauren E. Barghols, *Credit Checks and Applicants: What You Need to Know*, 17 NO. 9 OKLA. EMP. L. LETTER 4 (2009) (“[T]here is no reliable evidence linking theft, fraud, or other criminal activities to employees with negative credit reports.”). But unlike the case with credit history as a predictor of employee behavior, however, there is evidence of credit history being a valid predictor of insurance losses and loan repayment. Jerry K. Palmer & Laura L. Koppes, Investigation of Credit History Validity at Predicting Performance and Turnover 2 (Apr. 3, 2004) (paper presented at the 2004 Society for Industrial and Organizational Psychology Annual Conference) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

76. Jerry K. Palmer & Laura L. Koppes, Investigation of Credit History Validity at Predicting Performance and Turnover 3 (Apr. 3, 2004) (paper presented at the 2004 Society for Industrial and Organizational Psychology Annual Conference) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

that “[t]here was virtually no relationship between credit history and performance ratings” or termination,⁷⁷ thus placing into question the validity of the banking business exception seemingly carved out by the EEOC.⁷⁸

As noted by Adam T. Klein in his statement before the EEOC on employment testing and screening:

There is a complete absence of evidence that employee credit checks are job-related at all, much less consistent with business necessity, for *any* job—and there is substantial evidence that the credit records that employers check are based on factors substantially *unrelated* to any aspect of the performance of any job. . . . [C]redit checks as a basis for employment decisions is a practice validated by *no* studies, much less by studies meeting the strict standard for proving justified a job requirement imposing a disparate impact. . . . [I]t is hard to see how [the Supreme Court] would approve of a requirement validated only for non-employment uses (*e.g.*, for lenders to evaluate whether an individual likely will be able to pay back borrowed money).⁷⁹

2. Negative Credit Information May Reflect Events Outside of a Person’s Control, Not Employment-Related Traits

Although, *in theory* credit history “might measure responsibility, the ability to meet deadlines, dependability, integrity, and related employee characteristics[,]” in reality credit history

also reflects [individual circumstances] outside a person’s control[, including] the effects of separation, divorce, death, disability, accidents, the behavior of a co-signer, possible fraud or identity theft on a person’s finances and ability to meet bill deadlines, past youthful naivety, as well as economic shocks (*e.g.*, layoffs) for which an applicant could not have predicted or prepared⁸⁰

77. *Id.* at 4; see also Jerry K. Palmer & Laura L. Koppes, Further Investigation of Credit History as a Predictor of Employee Turnover 1 (May 30, 2003) (paper presented at the Fifteenth Annual Convention of the American Psychological Society) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*) (finding that “credit history had no validity at differentiating between ‘negative’ (*e.g.*, terminated for dishonesty) vs. ‘non-negative’ (*e.g.*, sickness, relocation) reasons for leaving, and had no validity at distinguishing these employees from those who remained on the job”).

78. See discussion in footnotes 63–70 of this Article and accompanying text.

79. U.S. EQUAL EMP. OPPORTUNITY COMM’N, STATEMENT OF ADAM T. KLEIN, ESQ. (2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html> (emphases in original).

80. Jerry K. Palmer & Laura L. Koppes, Investigation of Credit History Validity at Predicting Performance and Turnover 7 (Apr. 3, 2004) (paper presented at the 2004 Society for Industrial and Organizational Psychology Annual Conference) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*).

Furthermore, eighty-five percent of bankruptcy filings, the strongest cause of a negative record, “reportedly occur following ‘income loss, medical problems, or family breakup’—problems that do not trace to simple ‘Over-Consumption’ or any other trait that could be ‘job-related,’ much less a matter of ‘business necessity.’”⁸¹

3. Credit Reports Are Notoriously Inaccurate

For an indicator that has been afforded such weight, credit records are notoriously inaccurate and may include errors sufficiently serious to warrant denial of employment.⁸² On this basis alone, the value of pre-employment credit checks as a screening mechanism should be reassessed.⁸³

IV. POTENTIAL SOLUTIONS TO A NATIONAL PROBLEM

Amid skyrocketing unemployment, the issue of the validity of pre-employment credit checks for the purpose of making adverse employment decisions has received considerable attention, both on the federal and state levels. Regardless of whether federal or state legislation prohibiting

81. U.S. EQUAL EMP. OPPORTUNITY COMM’N, STATEMENT OF ADAM T. KLEIN, ESQ. (2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html> (citing Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1510 (2004)).

82. Kenneth G. Gunter, *Computerized Credit Scoring’s Effect on the Lending Industry*, 4 N.C. BANKING INST. 443, 451 (2000) (noting that the banking industry has acknowledged that incorrect credit information received from credit bureaus may result in inaccurate credit scoring); Jerry K. Palmer & Laura L. Koppes, *Further Investigation of Credit History as a Predictor of Employee Turnover* 7 (May 30, 2003) (paper presented at the Fifteenth Annual Convention of the American Psychological Society) (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*) (stating that several consumer advocate groups have argued that credit history data is often inaccurate, a fact addressed by some state legislatures); Assembly Bill Analysis of A.B. 943, as amended July 9, 2009, at 3, available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0901-0950/ab_943_cfa_20090908_204635_asm_floor.html (“A 2007 Zogby survey reported that 37% of people surveyed had found an error in their credit report and half of these respondents indicated that they could not easily fix the mistakes.”); CONSUMER FED’N OF AM. & NAT’L CREDIT REPORTING ASS’N, CREDIT SCORE ACCURACY AND IMPLICATIONS FOR CONSUMERS 6, 24 (2002), <http://www.ncrainc.org/documents/CFA%20NCRA%20Credit%20Score%20Report.pdf> (“Several organizations have conducted studies and surveys to quantify the pervasiveness of credit report errors, with widely ranging findings regarding how many credit reports contain errors (from 0.2% to 70%).”); Press Release, U.S. Pub. Int. Res. Group, *One in Four Credit Reports Contains Errors Serious Enough to Wreak Havoc for Consumers* (June 17, 2004), available at <http://uspirg.org/uspignewsroom.asp?id2=13650>.

83. Cf. Lani Guinier & Susan Sturm, Op-Ed., *Trial by Firefighters*, N.Y. TIMES, July 11, 2009, at A19, available at 2009 WLNR 13218606 (advocating “a clear-eyed reassessment of our blind faith in entrenched testing regimes”). Standardized tests, like credit checks, can be misleading and often do not accurately measure relevant traits of an individual. *Id.*

pre-employment credit checks comes to fruition, employers should reconsider the value of this practice and voluntarily discontinue it.

A. *Federal Legislation*

On July 9, 2009, Representative Steve Cohen of Tennessee introduced in the U.S. House of Representatives the Equal Employment for All Act, which was referred to the House Committee on Financial Services on the same day.⁸⁴ The purpose of the bill, currently “endorsed by 33 Members of Congress and a number of consumer and civil rights groups,”⁸⁵ is to amend the FCRA to “prohibit the use of consumer credit checks against prospective and current employees for the purposes of adverse employment decisions.”⁸⁶ Supporters of this bill hope that it will “give some of our most vulnerable, ‘credit-challenged’ citizens—students, recent college graduates, low-income families, senior citizens and *minorities*—the opportunity to begin rebuilding their credit history.”⁸⁷ In its present form, the bill reads, in part:

(b) Use of Certain Consumer Report Prohibited for Employment Purposes or Adverse Action-

(1) GENERAL PROHIBITION. Except as provided in paragraph (3), a person, including a prospective employer or current employer, may not use a consumer report or investigative consumer report, or cause a consumer report or investigative consumer report to be procured, with respect to any consumer where any information contained in the report bears on the consumer’s creditworthiness, credit standing, or credit capacity—

(A) for employment purposes; or

(B) for making an adverse action, . . .

(3) EXCEPTIONS. Notwithstanding the prohibitions set forth in this subsection, and consistent with the other sections of this

84. Equal Employment for All Act, H.R. 3149, 111th Cong. (1st Sess. 2009), *available at* http://www.gettoworkamerica.org/images/H.R._3149.pdf (proposing to amend the FCRA, which currently allows employers to use credit reports in employment decisions).

85. Press Release, U.S. Rep. Luis V. Gutierrez, Reps Gutierrez & Cohen to Announce Bill to Prevent Use of Credit Scores in Hiring Process (July 28, 2009), *available at* <http://luisgutierrez.house.gov/PRArticle.aspx?NewsID=1389>. As of publication date, there were fifty-three co-sponsors of the bill. GovTrack, H.R. 3149 [111th]: Equal Employment for All Act, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3149> (last visited Mar. 24, 2010).

86. H.R. 3149.

87. Press Release, U.S. Rep. Luis V. Gutierrez, Reps Gutierrez & Cohen to Announce Bill to Prevent Use of Credit Scores in Hiring Process (July 28, 2009), *available at* <http://luisgutierrez.house.gov/PRArticle.aspx?NewsID=1389> (emphasis added).

Act, an employer may use a consumer report with respect to a consumer in the following situations:

- (A) When the consumer applies for, or currently holds, employment that requires national security or FDIC clearance.
- (B) When the consumer applies for, or currently holds, employment with a [s]tate or local government agency which otherwise requires use of a consumer report.
- (C) When the consumer applies for, or currently holds, a supervisory, managerial, professional, or executive position at a financial institution.
- (D) When otherwise required by law.⁸⁸

Given the inability of credit history to predict successful job performance,⁸⁹ Congress should amend the FCRA as currently proposed,⁹⁰ with one exception. Although case law seems to suggest that a banking business exception has been carved out, absent a validation study showing “a demonstrable relationship”⁹¹ between “a supervisory, managerial, professional, or executive position at a financial institution”⁹² and “successful performance,”⁹³ Congress should reconsider the provision enunciating such an exception.

B. State Legislation

Prior to the introduction of the Equal Employment for All Act, several states were already beginning to question the legality of pre-employment credit checks.⁹⁴ Two states in particular, Washington and Hawaii, have

88. H.R. 3149, § 2(b)(1), (3).

89. See discussion in Part III.B.1 of this Article.

90. See Kelly Gallagher, Note, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for “Employment Purposes” Goes Too Far*, 91 IOWA L. REV. 1593, 1617, 1619 (2006) (stating that Congress should “amend the FCRA to limit an employer’s right to use personal credit history information in making adverse employment decisions where such information is of little relevance to the employee’s duties” or, alternatively, Congress should “enact employment legislation requiring employers to show that good credit history is actually related to job performance and, thus, justifies the use of credit reports as a basis for adverse employment decisions” (footnotes omitted)); cf. U.S. EQUAL EMP. OPPORTUNITY COMM’N, STATEMENT OF ADAM T. KLEIN, ESQ. (2007), <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html> (stating that barring employee credit checks would comport with Title VII’s goals). “Even though most employers undertaking credit checks may not be *intending* to screen out members of racial minorities, that is the clear *effect* of the practice in violation of Title VII.” *Id.* (emphases in original).

91. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

92. H.R. 3149, § 2(b)(3)(C).

93. *Griggs*, 401 U.S. at 431.

94. See, e.g., H.B. 5521, 2009 Leg., Jan. Sess. (Conn. 2009) (proposing to amend Connecticut law to prevent employers from making employment decisions based on credit reports); H.B. 4528, 95th Leg., Reg. Sess. (Mich. 2009) (prohibiting employers from using an

already banned the common employment practice, and a number of other states are considering a similar prohibition. In Washington, the state legislature amended the Washington Fair Credit Reporting Act by including the following section:

(c) [A] person may not procure a consumer report for employment purposes where any information contained in the report bears on the consumer's creditworthiness, credit standing, or credit capacity, unless the information is either:

- (i) Substantially job related and the employer's reasons for the use of such information are disclosed to the consumer in writing;
- or
- (ii) Required by law.⁹⁵

Similarly, in Hawaii, the state legislature—overriding a veto from Governor Linda Lingle—made the following amendment to Chapter 378 of the Hawaii Revised Statutes:

It shall be an unlawful discriminatory practice:

- (8) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment of any individual because of the individual's credit history or credit report, unless the information in the individual's

applicant's credit history as a criteria for hiring in Michigan); H.B. 144, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009) (attempting to restrict employers' use of credit scores in employment practices in Missouri); Assem. B. 2067, 2009 Leg., 231st Sess. (N.Y. 2009) (allowing New York employers to request and consider a credit report *only if* the credit history is directly related to employment); S.B. 91, 128th Gen. Assem., Reg. Sess. (Ohio 2009) (proposing to make employment discrimination based on credit history unlawful in Ohio); Tex. H.B. 437, 81st Leg., R.S. (2009) (limiting Texas state agencies' use of credit checks in employment screening). The California legislature considered a bill that would prohibit employer use of consumer credit reports with some exceptions, but Governor Arnold Schwarzenegger vetoed the bill on October 11, 2009. Assem. B. 943, Reg. Sess. (Cal. 2009). According to the governor,

This bill is similar to legislation I vetoed last year on the basis that California's employers and businesses have inherent needs to obtain information about applicants for employment and existing law already provides protections for employees from improper use of credit reports. As with last year's bill, this measure would also significantly increase the exposure for potential litigation over the use of credit checks. Assem. B. 943, Veto (Cal. 2009) (referring to previously vetoed Assembly Bill 2918, which was very similar to Bill 943).

95. WASH. REV. CODE § 19.182.020(2)(c) (2009). But if the information that the credit history report provides is to be used adversely by the employer, then the applicant must be provided with the contact information of the consumer reporting agency that provided the report, a detailed list of the consumer's rights regarding the procurement of credit history reports for employment purposes, and "a reasonable opportunity to respond to any information in the report that is disputed by the consumer." *Id.* § 19.182.020(2)(d).

credit history or credit report directly relates to a bona fide occupational qualification.⁹⁶

Notwithstanding this section, the prohibition does not apply to “managerial or supervisory employees” or “employers that are financial institutions in which deposits are insured by a federal agency having jurisdiction over the financial institution.”⁹⁷

If Congress ultimately decides not to enact the Equal Employment for All Act (or if Congress does not enact the bill in a reasonable amount of time), other states should enact legislation prohibiting the procurement of credit reports for employment purposes, given that credit histories are *not* a valid predictor of successful job performance.⁹⁸ Because the level of protection states are currently considering offering to job applicants runs the gamut, state legislatures should ensure that any exclusions to a general prohibition are supported by validation studies showing “a demonstrable relationship” between the position in question and “successful performance.”⁹⁹

C. Voluntary Employer Action

As explained previously, rational arguments have been made for the use of pre-employment credit checks as a screening mechanism.¹⁰⁰ Despite these arguments, however, credit checks have received little research attention as a predictor of employment performance.¹⁰¹ In fact, the only study to date attempting to correlate credit history with employment performance found virtually no relationship between credit history and performance ratings.¹⁰² Similarly, there is no evidence correlating employee theft with negative credit history.¹⁰³ Conventional wisdom may correlate negative credit history with the propensity to steal, but employee-theft studies have failed to make this connection.¹⁰⁴ Given that

96. HAW. REV. STAT. § 378-2(8) (2009).

97. *Id.* § 378-2.7(a)(3)-(4). An additional safeguard in Hawaii’s credit discrimination legislation is that “[i]nquiry into and consideration of a prospective employee’s credit history or credit report may take place only after the prospective employee has received a conditional offer of employment.” *Id.* § 378-2.7(a)(1). Furthermore, even after a conditional offer of employment has been extended, the applicant’s credit history must be “directly related to a bona fide occupational qualification.” *Id.*

98. See discussion in Part III.C.1 of this Article.

99. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

100. See discussion in footnotes 72–74 of this Article and accompanying text.

101. See discussion in footnote 75 of this Article and accompanying text.

102. See discussion in footnotes 76–77 of this Article and accompanying text.

103. See discussion in footnote 75 of this Article and accompanying text.

104. HR Specialist: Employment Law, *Prevent New Type of Lawsuit: Credit-Check Discrimination*, BUS. MGMT. DAILY, Mar. 2, 2007, <http://www.businessmanagementdaily.com/articles/5013/1/Prevent-new-type-of-lawsuit-Credit-Check-discrimination/Page1.html>.

the U.S. Chamber of Commerce has “estimate[d] that 75% of employees steal from the workplace and that most do so repeatedly[.]”¹⁰⁵ the argument that a negative credit history is indicative of a propensity to steal seems superficial.

Rather than relying on this notoriously inaccurate measure, employers should engage in a multi-pronged strategy¹⁰⁶ to prevent employee theft, including the use of integrity tests, which are “selection devices designed to measure an applicant’s attitudes toward theft, dishonesty, drug use,

Disgruntled employees who take out their low pay or lack of advancement frustrations by stealing from their company “tend to be young, unmarried[,] and more likely to work part-time.” *Id.* In addition, “larger thefts are carried out by well-educated, white-collar workers in their [thirties].” *Id.* Since young workers do not have established credit, pre-employment credit checks usually will not identify those workers. *Id.* Similarly, credit checks will usually be unhelpful in identifying white-collar thieves, who are usually motivated by financial distress and greed. *Id.* Despite these problems with using credit checks during the hiring process, credit checks may provide some measure of psychological comfort to employers who feel compelled to screen workers who will be responsible for money. *Id.*; Suzanne Mahadeo, *FraudBasics: White-Collar Crime Demographics*, FRAUD MAGAZINE, Jan.–Feb. 2006, available at <http://www.acfe.com/resources/view.asp?ArticleID=502> (highlighting the landmark 1983 study, “Theft By Employees,” in which Richard C. Hollinger and John P. Clark observed that younger workers were more prone to theft for the following reasons: (1) lack of investment in the job, (2) low pay, and (3) a naïve understanding of the culture of the workforce (i.e., naïve enough to not understand the severity of theft)).

105. Employee Theft Solutions—The Shulman Center—Employee Theft Statistics, <http://www.employee theft solutions.com> (last visited Mar. 2, 2010).

106. Lauren E. Barghols, *Credit Checks and Applicants: What You Need to Know*, 17 NO. 9 OKLA. EMP. L. LETTER 4 (2009) (proposing that credit checks do not need to be performed on all applicants). Instead, employers should thoroughly examine the information in each applicant’s resume and “maintain a sufficient system of checks and balances on employees handling money or sensitive financial data to minimize the temptation to commit fraud or other illegal acts.” *Id.*; HR Specialist: Employment Law, *Prevent New Type of Lawsuit: Credit-Check Discrimination*, BUS. MGMT. DAILY, Mar. 2, 2007, <http://www.businessmanagementdaily.com/articles/5013/1/Prevent-new-type-of-lawsuit-Credit-Check-discrimination/Page1.html> (advising employers to focus on other non-discriminatory practices that can prevent employee theft more effectively than credit checks, including thorough background investigations of job applicants, continuing background checks for employees, regular monitoring of employee activity, use of appropriate financial controls, and regular independent audits); William I. Sauser, Jr., *Employee Theft: Who, How, Why, and What Can Be Done*, S.A.M. ADVANCED MGMT. J. 2007, at 21–24 (suggesting that employers (1) screen out potential employee thieves by checking references, conducting background investigations, and using integrity tests; (2) create an organizational culture of character by establishing a code of conduct, setting a personal example of integrity, and showing respect for all employees; (3) remove temptations to steal by employing accounting controls, using security devices, and auditing operations and procedures; and (4) punish theft and reward honesty by disciplining or dismissing employees who steal, prosecuting criminal theft and fraud, and sharing the rewards of honest work).

and other counterproductive work behavior.”¹⁰⁷ To determine whether or not an applicant has counterproductive work behavior, “overt integrity tests simply ask questions of applicants about their views and personal experiences with regard to topics such as stealing and taking drugs.”¹⁰⁸ And to identify candidates who falsely answer questions, integrity tests often include a number of questions designed to discover those who are responding in an overly positive manner.¹⁰⁹ Although budget constraints during the current economic downturn may tempt employers to focus on screening applicants by unreliable measures such as credit checks, “[f]ollowing through on such a temptation can only be characterized as being ill-advised,”¹¹⁰ especially given that the cost of an integrity test is relatively low.¹¹¹ Moreover, researchers have shown that integrity tests are *valid* predictors of employee theft (and a host of other counterproductive behaviors in the workplace) and overall job performance ratings, regardless of job-level complexity.¹¹²

Despite a substantial amount of research accepting that integrity tests are effective, few companies employ them, which may be attributable to the failure of this research to evaluate return on investment.¹¹³ Recently,

107. Michael C. Sturman & David Sherwyn, *The Utility of Integrity Testing for Controlling Workers' Compensation Costs*, 50 CORNELL HOSPITALITY Q. 432, 432 (2009).

108. *Id.* at 433.

109. *Id.*

[I]t is important to note that neither researchers nor vendors claim that these tests are completely accurate. Even though the tests typically contain questions designed to catch those who are faking answers, it is highly likely that some individuals do get away with faking answers on the drug or theft questions. Thus, employers should not think that integrity tests can perfectly eliminate all undesirable behaviors. Nonetheless, integrity tests clearly can be used to screen out a large number of individuals who freely admit that they engage in behaviors that employers simply do not want in an employee.

Id. at 438.

110. VANGENT, INC., ORGANIZATIONAL ETHICS AND COUNTERPRODUCTIVITY RISKS DURING AN ECONOMIC DOWNTURN: CAUSES AND MITIGATION 12 (2009), http://www.vangent.co.uk/images/Vangent_Organizational_Ethics_Research_Paper.pdf (arguing that employers should focus not only on assessing potential employees' skills and abilities, but on whether they demonstrate a propensity to have a strong work ethic).

111. Michael C. Sturman & David Sherwyn, *The Utility of Integrity Testing for Controlling Workers' Compensation Costs*, 50 CORNELL HOSPITALITY Q. 432, 439 (2009).

112. *Id.* at 434; William I. Sauser, Jr., *Employee Theft: Who, How, Why, and What Can Be Done*, S.A.M. ADVANCED MGMT. J. 2007, at 2021. *But see* Jerry K. Palmer & Laura L. Koppes, Investigation of Credit History Validity at Predicting Performance and Turnover 1 (Apr. 3, 2004) (paper presented at the 2004 Society for Industrial and Organizational Psychology Annual Conference) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

113. Michael C. Sturman & David Sherwyn, *The Utility of Integrity Testing for Controlling Workers' Compensation Costs*, 50 CORNELL HOSPITALITY Q. 432, 434 (2009) (“[A

however, studies have shown that organizations that use integrity testing have received “very high returns on investment.”¹¹⁴ Furthermore, though the replacement of one pre-employment screening measure with another may raise potential legal concerns, “research on integrity tests suggest[s] that adverse impact [on racial minorities] is not a significant risk.”¹¹⁵ At a potential cost of \$1307 per dishonest employee, “[e]nsuring that only job candidates with the highest levels of ethics and integrity are hired provides an inoculation against the detrimental impact of turbulent economic times on organization workforces.”¹¹⁶ The bottom line: credit checks are not a valid predictor of “successful performance,” as required by *Griggs* (and, thus, neither job-related nor consistent with business necessity), and employers should consequently discontinue the use of pre-employment credit checks as a screening mechanism even absent a statutory prohibition.

V. CONCLUSION

According to Herbert Spencer, “This survival of the fittest . . . is that which Darwin has called ‘natural selection, or the preservation of [favored] races in the struggle for life.’”¹¹⁷ The twenty-first century’s equivalent to survival of the fittest is the current employment application process. Because racial minorities have lower credit scores, the increasing use of pre-employment credit checks has effectively resulted in the exclusion of many minorities from the workforce during an economic downturn and, thus, the perpetuation of broader racial inequalities in contemporary society. This Article has demonstrated that such a practice has a disparate impact on racial minorities and, given that credit history bears no “demonstrable relationship to successful performance” as re-

1999] study of 959 organizations in twenty countries found that integrity tests were rarely or never used.”).

114. *Id.* at 443–44; VANGENT, INC., ORGANIZATIONAL ETHICS AND COUNTER-PRODUCTIVITY RISKS DURING AN ECONOMIC DOWNTURN: CAUSES AND MITIGATION 12 (2009), http://www.vangent.co.uk/images/Vangent_Organizational_Ethics_Research_Paper.pdf.

115. Michael C. Sturman & David Sherwyn, *The Utility of Integrity Testing for Controlling Workers’ Compensation Costs*, 50 CORNELL HOSPITALITY Q. 432, 437 (2009). A recent study “based on four large databases showed that there were no significant race differences for [B]lacks, Hispanics, Asians, or American Indians compared to [W]hites.” *Id.* (citing Deniz S. Ones & Chockalingam Viswesvaran, *Gender, Age, and Race Differences on Overt Integrity Tests: Results Across Four Large-Scale Job Applicant Data Sets*, 83 J. APPLIED PSYCHOL. 35–42 (1998)).

116. VANGENT, INC., ORGANIZATIONAL ETHICS AND COUNTERPRODUCTIVITY RISKS DURING AN ECONOMIC DOWNTURN: CAUSES AND MITIGATION 16 (2009), http://www.vangent.co.uk/images/Vangent_Organizational_Ethics_Research_Paper.pdf.

117. HERBERT SPENCER, THE PRINCIPLES OF BIOLOGY 444–45 (1864).

quired by *Griggs*, cannot be considered either “job-related” or “consistent with business necessity.” Consequently, Congress should remedy this problem by amending the FCRA as currently proposed (with one exception) in the Equal Employment for All Act to limit an employer’s right to procure an applicant’s credit report. Alternatively, states should enact legislation that would have the same effect. Absent a federal or state statutory prohibition, however, employers should reexamine their current screening mechanisms and consider *valid* predictors of performance. The state of the economy depends on it.

